

THE ISLAMIC LAW IN THE HISTORICAL STUDY

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Abstract

Dalam kajian tentang sejarah awal Islam dan agama di dunia Barat, Islam dipandang sebagai agama "dalam sejarah". Melalui pandangan ini, para sarjana mempelajari sejarah awal Islam, di antaranya, dengan menggunakan metode analisa kritik terhadap sumber-sumber sejarah termasuk kepustakaan selain Islam dijadikan sebagai sumber dan bukti sejarah. Sejak itu pula hukum Islam dikaji melalui pendekatan yang sama. Melalui pendekatan ini diyakini bahwa hukum Islam mengandung tradisi-tradisi keagamaan khususnya di wilayah timur dekat yang ada sebelum Islam, dan dipandang sebagai suatu perkembangan yang berkelanjutan. Sebagaimana hasil kajian daripada Patricia Crone dan Gordon D. Newby menunjukkan bahwa di antara tradisi-tradisi keagamaan dimaksud, salah satunya, adalah hukum Yahudi. Crone memberikan contoh *qasâma* khususnya yang ada pada mazhab Maliki dan mengklaim bahwa *qasâma* dimaksud merupakan salah satu tradisi hukum yang ada pada orang-orang Yahudi. Sedangkan Newby memberikan contoh tentang penentuan orang banci sebagai laki-laki atau sebagai perempuan dalam hubungannya dengan pembagian kewarisan yang ada pada catatan 'Âmir b. Zârib di dalam *sîrah Ibnu Ishâq*, dan mengklaim juga bahwa catatan tersebut berasal dari hukum Yahudi. Sebaliknya, pendekatan ini merupakan salah satu pendekatan yang ada dalam kajian hukum Islam dan sangat baik dipakai untuk mencari keseimbangan dan menunjukkan bahwa walaupun terdapat kesamaan antara hukum Islam dengan hukum-hukum yang lain, proses sejarah perkembangan hukum Islam itu sendiri sangat berbeda dan mempunyai karakter yang khusus.

Kata kunci : Historical study, Islamic law, Jewish law.

Introduction

In the western study of early Islamic history and religion, some scholars have approached Islam as a religion 'in history'. This approach had been applied towards studying Judaism and Christianity as well. According to Andrew Rippin, "The view is that [in the] history ... of these religions ... the intervention of God in the historical sequence of events is the most significant truth attested by these religions." Therefore, this view has led to an emphasis on the desire to discover 'what really happened'. For Islam, in implementing this idea, its available sources which purport to record and provide with an account of 'what really happened', are studied.¹ In studying these sources, among other things, the scholars analyze them by source-critical methods including the relevant contemporary non-Arabic literature also as an

evidence.²

One example of source-critical method is clearly illustrated by the finding of Crone. In her *Meccan Trade and the Rise of Islam*, she examines the notion that Mecca was the center of an important international trading network, from which its inhabitants gained considerable wealth and a pre-eminent position in Peninsula politics. Crone in this book has studied this trade in both Muslim and non-Muslim sources, and demonstrates that the whole picture as such is unfounded. She argues that Mecca was not on the overland trade route from Southern Arabia to Syria, which in any case was never very important, compared to the maritime route through the Red Sea. By the end of the second century A.D., this route was no longer in use.³

In using the Muslim literary sources to examine

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1 J. Koren and Y. D. Nevo, 1991, "Methodological Approaches to Islamic Studies," in *Der Islam*, 68 (1991): 87.

2 J. Korea, and Y. D. Nevo 1991, "Methodological Approaches," 98. For critical-source of the Qur'ân, see J. Wansbrough (1977) who concludes that the Qur'ân was compiled or canonized at the end of the second century of Islam, *Quranic Studies*, Oxford University Press, Oxford, 1977.

3 Patricia Crone, 1987, *Meccan Trade and the Rise of Islam*, Princeton University Press, Princeton, p. 203. For its review article, see, R. B. Serjeant, 1990, "Meccan Trade and the Rise of Islam: Misconceptions and Flawed Polemics," *Journal of the American Oriental Society*, 110, 3 (July-September): 473-486.

this matter, Crone concluded that Muslim sources on the rise of Islam are questionable historical value. The Qur'an, for example, does not offer much historical information; what it does offer is formulated in a style which is illusive and largely intelligible only on its own terms. Therefore, according to Crone, without the help of the exegetical literature, one would not be able to identify the historical events referred to in certain verses. The explanations or commentaries of the exegetes, on the other hand, may not necessarily be in accordance with what Prophet had in mind when he recited these verses.⁴

The Islamic Law in Tradition of Near East

The example mentioned above is a consequence of such an attitude in approaching Islam. Since Islam has been approached as a religion in history, consequently, Islamic law is also approached in the same way. For they hold this approach, they believe that, as Marshall G. S. Hodgson says, Islam became a dominant religion in the Near East and succeeded perhaps most strongly in building for itself a distinct society. Islam also developed its own system of comprehensive law and created its own classical literature.⁵ In contrast, they also believe that, as Bernard Lewis holds, during the period of greatness of the Arab and Islamic empires in the Near and Middle East, the flourishing civilization which grew up and is usually known as Arabic was not "brought ready-made by the Arab ..., but was created after the conquest by the collaboration of many peoples."⁶ It was not even purely Muslim, for many Christians, Jews and Zoroastrians were among its creators. But its chief medium of expression was Arabic, which was dominated by Islam. It was these two things, according to Lewis, their language and their faith which were the great contribution of Arabs to the new and original civilization which developed.⁷

Through a historical study by source-critical methods, many researchs in laws have been done with various purposes, one of them is to find out what things Islamic law has taken from other religious laws. Some scholars have tried to do so, one of them is

Patricia Crone who has attempted to argue for the influence of Jewish law on early Islamic law. In one of her attempts, she holds that the *qasâma* in Islamic law was derived from the Jewish law. According to her. "The *qasâma* is an Islamic institution of unmistakable jahili appearance and the Islamic tradition almost unanimously agrees that *qasâma* existed in the jahiliyya."⁸ All schools of law agree that the *qasâma* is a procedure which is used in relating to homicide and which consist of fifty oaths. They also agree that the number of oaths is more important than to that of supporters, so that the collective nature of the institution has become somewhat changed: less than fifty supporters, sometimes even a single one, can perform a valid *qasâma* by swearing more than one oath.⁹

According to Hanafîs, "the *qasâma* is used if a person is found murdered in a quater, village or other locality, and if the kinsmen of the victim suspect the residents of the locality in question of having murdered him. Fifty members of the suspected group must swear that they did not kill the man and do not know who killed him."¹⁰ If they swear as such, then they escape retaliation, but they are still obliged to pay blood money. If they refuse, however, they must be imprisoned until they either swear or confess. In its procedure, the Hanafi insisted that the accused is not backed by oath supporters. The supporters do not swear in support of another person's oath, but they do so on their own behalf, because they are under suspicion. Apart from swearing for themselves, they also swear on the behalf of the wider community which they represent.¹¹ Mâlikî *qasâma*, however, differs from other schools, particularly the Hanafi school. In its procedure, the oath is awarded to the accusers and it may be shifted to the accused. According to Crone, from the point of view of tribal law, the Mâlikî procedure is unlikely to be of Jâhilî origin.¹²

In the pre-Islamic period, Arabs were familiar with the procedure in which the oath is taken by both the defendant himself and a number of supporters who are usually chosen from among the defendant's kinsmen. The supporters are in no way witnesses to

4 Marshall G. S. Hodgson, 1962-1963, "The Interrelation of Societies in History," *Comparative Studies in Society and History*, V, p. 237.

5 Bernard Lewis, 1967, *The Arabs in History* Harper & Row, New York, p. 131.

6 Ibid.,

7 Patricia Crone, 1984, "Jâhilî and Jewish law: the *qasâma*," *Jerusalem Studies in Arabic and Islam*, 4: 155

8 Ibid., 160

9 Ibid.,

10 Ibid., 161

11 Ibid., 187

12 Ibid., 157

the event, but only display their readiness to believe and support the accused. The procedure, therefore, is "being in fact a test of kinship solidarity." If all the supporters swear, and do so correctly, the defendant is acquitted, but if one or more refuse, compensation or restitution is automatically awarded to the plaintiff.¹³ This procedure, according to Crone, is identical with compurgation, but not with *qasâma* of Islamic law. There was indeed pre-Islamic compurgation; presumably its use was not restricted to cases of homicide, whether it included the cases of theft or similar cases there is no recollection.¹⁴

Further, Crone analyzes the *qasâma* in Umayyad practice. She demonstrates that it seems that the Maliki institution represents such practice. The Umayyads shifted the oath, at least from the time of Marwân I onwards. Though there are a number of traditions which do not necessarily represent historical fact, the Umayyads awarded the oath to the accusers, granting them retaliation if they did swear.¹⁵ As has been noted earlier, from the point of view of tribal law, the Mâlikî's award of the oath to the accusers and its shift to the accused is unlikely to be of Jâhilî origin, but owes, according to Crone, its particular features to Rabbinical law. So the institution which was modified by the Umayyads against crime, therefore, was not a jahili institution, but rather a Deuteronomie institution which was modified by Rabbinic ideas regarding oaths. It can be seen that the shifted oath was well known to the Rabbis who knew it in two forms, both of which, Crone argues, reappear on the Muslim side.

The first was the so-called Post-Mishnaic oath, which was used in connection with debts. If a plaintiff had no evidence to show for his claim, not even a single witness, the defendant could either rebut the claim by an oath or pass the oath to the plaintiff.... In Sunni law the oath has come to be shifted automatically on the defendant's refusal to swear.... The second form of the shifted oath was the Mishnaic oath of the suspected liar. If a person has committed perjury in the past, he is not allowed to swear, and the oath shifts to the plaintiff instead. If the plaintiff is also of doubtful veracity, the result is that neither party can swear. Some Rabbis accordingly held that the case should be

dismissed, but others were of the opinion that judgment should be given against the defendant, and still others thought that the parties should go halves.¹⁶

It is clear that the *qasâma*, as Crone maintains, became a shifted oath because Muslims borrowed the idea from the Rabbis. The principle is that "the oath is to be awarded to whoever has the presumption in his favour: the oath shifts as the presumption changes." This principle itself is rabbinical. In practice, however, the rabbis could not make the rules entirely consistent with it, because the Pentateuch awards the oath to the defendant, and what the scripture ordains evidently cannot be changed. But the Rabbis agree that the oath is to be awarded to whoever has the presumption in his favor, and since they no longer felt bound by the Pentateuch, they were free to let the principle shape the rules.¹⁷ Crone finally concludes that what the Mâlikî *qasâma* represents is thus a Pentateuchal institution taken to pieces. Crone quotes Kalbî's version of the *qâtil Khaybar*.¹⁸

When a Muslim was found murdered at Khaybar, the Prophet, according to Kalbi, wrote to the Jews saying that a *qâtil* had been found in their midst. The Jews wrote back saying a similar incident had occurred in ancient Israel and that God had revealed to Moses what to do: if Muhammad was a Prophet, he could similarly ask God. Muhammad wrote back saying that God had shown him that he should choose fifty jurors from among them, that the fifty men should swear 'by God we did not kill him, neither do we know who did', and that next they should pay compensation. The Jews replied: 'you have judged our case according to the law' (*nâmûs*).¹⁹

From the story of Kalbî, Crone further argues that a Jâhilî institution was being modified by social and political change. As has been noted that the *qasâma* testifies, not to a continued practice of Jâhilî law, but to a following of the Pentateuch, because, according to Crone, "[w]hat Moses began, Muhammad continued; and in Kalbî's story the very proof of Muhammad's Prophethood lies in the fact that he dispenses Mosaic

13 Ibid., 158

14 Ibid., 187

15 Ibid., 190.

16 Ibid., 192.

18 Shams al-Din al-Sarakhsî, 1906/1324, *Kitâb al-Mabsûṭ*. Vol. XXVI, Matba'at al-Sa'âda, Cairo, p. 107

19 Ibid., 175

law: Muhammad has here come, not to abolish law, but to confirm it.²⁰

In respect to historical perspective, several publications have discussed the existence and influence of Jews in Arabia. It is known that before Islam, Medina was the chief of the Jewish colonies in Arabia and was where S. D. Goitein believes that their customs and cultures were introduced and cultivated. In this city the Prophet spent the last ten years of his life and assumed the customary law of the city, which he carried out, and what was added to it, was the common law of Medina. This common law was the starting point of Islamic jurisprudence and that was the law of the Jewish colony.²¹

Another scholar who has tried to find out what things Islamic law has taken from Jewish law through a historical study by source-critical methods is Gordon D. Newby. He shows how the Rabbis developed their law based on their own belief and practice, and at the same time how certain Islamic traditions were influenced by Rabbinical ideas. The example given by Newby concerns the Jewish Hermaphrodite. He examines the account of 'Amir b. Zârib b. 'Amr b. Iyâdh b. Yashkur b. 'Adwân in the *sîrah* of Ibn Ishâq. The *sîrah* states that:

The Arabs used to refer every serious and difficult case to him [Zârib] for decision and would accept his verdict. Once it happened that a case in dispute in reference to a hermaphrodite was brought to him. They said, 'Are we to treat it as a man or a woman?' They had never brought him such a difficult matter before, so he said, 'Wait a while until I have looked into the matter, for by Allah you have never brought me a question like this before.' So they agreed to wait, and he passed a sleepless night turning the matter over and looking at it from all sides without any result. Now he had a slave-girl Sukhayla who used to pasture his flock. It was his habit to tease her when she went out in the morning by saying sarcastically, 'You're early this morning. Sukhayla'; and when she returned at night he would say, 'You're late to-night, Sukhayla,' because she had gone out late in the morning and come back late in the evening after the others. Now when this girl saw that he could not sleep and

tossed about on his bed she asked what his trouble was. 'Get out and leave me alone, for it is none of your business,' he retorted. However, she was so persistent that he said to himself that it might be that she would provide him with some solution of his problem, so he said: 'well then, I was asked to adjudicate on the inheritance of a hermaphrodite. Am I to make him a man or a woman? By God I do not know what to do and I can see no way out.' She said, 'Good God, merely follow the course of the urinary process.' 'Be as late as you please henceforth, Sukhayla; you have solved my problem,' said he. Then in the morning he went out to the people and gave his decision in the way she had indicated.²²

After examining *tractate Bikkurim* and Hellenistic sources concerning this issue, Newby believes that this narrative was more likely derived from *Bekôrôth* 42b, "in the midst of a discussion of ritual slaughter of animals." He says:

we learn of the *ṭumṭum* that The doubt is only whether it is to be regarded as a male or a female. Now if it urinates in the male part, then all agree that it is a male. The doubt arises, however, if it urinates in the female part.' This is according to R. Simeon b. Judah, but Simeon b. Lakish said, 'The ruling that the *ṭumṭum* is doubtful case (as regards sex) relates only to a human being, since his male and female parts are in the same place. But in the case of an animal, if it urinates in the female part, it is a female'.²³

From this *ṭumṭum*, Newby argues that though urination is not a test for human beings, nor does it provide the answer to questions of inheritance, as has been stated in the *sîrah* of Ibn Ishâq, the linking of the method of determining the sex of hermaphrodite and the subject of inheritance can be found in a portion which is codified in the Talmudic literature.²⁴

Furthermore, he argues that on the Muslim side there are, at least, two Islamic traditions concerning similar cases to that of 'Âmir b. Zârib which are preserved in *Sunan al-Dârimi*.²⁵ The first one is transmitted from 'Ubayd Allah b. Mûsâ from Isrâ'îl from

20 Ibid., 176

21 S. D. Goitein, 1964, *Jews and Arabs*, Schocken, New York, p. 48.

22 A. Guillaume, 1990, *The Life of Muhammad*, Oxford University Press, Oxford, p. 51; Gordon D. Newby, 1986, "The *Sîrah* as a Source for Arabian Jewish History," *Jerusalem Studies in Arabic and Islam*, 7: 124-125

23 Newby, 1986, "The *Sîrah*," 126

24 Ibid.,

25 'Abd Allah b. al-Rahmân al-Dârimi al-Samarqandî, 1987, *Sunan al-Dârimi*, Vol. II, Dâr al-Kitâb al-'Arab, Beirut, p. 461

'Abd al-'A'lâ who heard Muhammad b. 'Alî's report which came from 'Alî who says "a man who 'had that which was appropriate to a man and that to a woman. In which of the two manners would he inherit?" So he said, 'From which does he urinate?' "The second tradition is transmitted from Abû Bakr b. Abû Shaybah, from Hushaym, from Mughîrah from Shubâk from al-Sha'bî from 'Alî, "who said, 'He inherits from where he urinates'." These two traditions which are go back to 'Alî b. Abî Tâlib, according to Newby, were most likely as old and strong as the account of 'Âmir b. Zârib in the *sîra* of Ibn Ishâq, as this account is transmitted from Yahyâ b. 'Abbâd b. 'Abdullah b. al-Zubayr from his father, 'Abbâd. According to Newby,

Yahyâ is generally regarded as a sound transmitter, and this *isnâd* is without the defects that often mar other of Ibn Ishâq's *isnâds* in the sight of later and more scrupulous traditionists. From the perspective of the rest of Ibn Ishâq's methodology, the formation of this account took place at least two generations removed from him or he would have commented on the reliability of one of the members of the chain or prefaced the tradition with a disclaimer.²⁶

Newby also believes that the account of 'Âmir b. Zârib given by Ibn Ishâq is not taken from the two traditions which go back to 'Alî, but he insists that this account is from *Bekôrôth* 42b. He argues that "it would seem that there are at least two stages in the development of the story. The first most likely occurs in the context of Arabian Jewry ... [where] the method of gender determination applied to animals is applied to humans as well," this is as a process of judicial development among the Rabbis in Arabia based on their belief and practice, though it has been argued by Simeon b. Lakish, as has been mentioned above, that "the application of the principle of urination for gender determination should not be applied to humans."²⁷

Further, Newby argues that the next stage in the development of the story was possibly undertaken by *quššâš* (preachers or storytellers). They were intermediaries between Jewish and Islamic materials,

particularly in the transmission of the genre known as *Isrâ'iliyyât*. It was because of *quššâš* that the influence of Jewish law on early Islamic law took place in Babylonia (Iraq). Apart from the fact that many Jews accepted Islam, there were academies of Jewish learning in Babylonia which continually flourished before and even after the conquest of Iraq by Muslims. In Babylonia, too, the Talmud, which is final Jewish religious expression, received its codification by 500 A.D.²⁸

The companions and the followers of Muhammad in early period in Iraq were *qurrâ'* (those who memorize and recite the Qur'an) and *quššâš*. According to C. M. Stanton, it was in their hands that the study circles to guide the faithful in religious matters emerged, and that mosques were established as community centers.²⁹ G. H. A. Juynboll further argues that '*ulamâ'* and *fuqâhâ'* by popular acclaim were from the ranks of *quššâš*. His argument is based on the assumption that the responsible scholars for the transmission of earliest hadîths, who provided them with *isnâds*, were called *quššâš*.³⁰

According to M. G. Morony, both *qurrâ'* and *quššâš* were the religious leaders and scholars. Their authority was based on their ability to remember and interpret the Qur'an and the practices of Muhammad.³¹ At the most practical level, according to Morony, their activities provided authoritative examples to other Muslims of the proper way to accomplish religious practices such as ritual obligations. An example of this was the way in which 'Abd al-Rahmân Ibn Abî Lailâ (d. 701) at Kufa is reported to have declined the opportunity to dry his hands after performing the ritual ablution (*wudû'*). The ability of scholars to set religious usages in an authoritative way made possible the disguise of innovations that incorporated local customs.³²

In general, what has been decided concerning *qasâma* in Maliki school, according to Crone, was derived from Jewish law, and what has been discussed and decided in the account of 'Âmir b. Zârib in the *sîrah* of Ibn Ishâq concerning hermaphrodite, according to Newby, was also from Jewish Law.

26 Newby, 1986, "The *Sîrah*," 128.

27 Ibid., 129

28 Ibid.,

29 Charles Michael Stanton, 1990, *Higher Learning in Islam*, Rowman & Littlefield Publishers, Inc., Maryland, p. 22.

30 G. H. A. Juynboll, 1983, *Muslim Tradition*, Cambridge University Press, Cambridge, p. 74

31 Michael G. Morony, 1984, *Iraq After the Muslim Conquest*, Princeton University Press, Princeton, p. 433.

32 Idem. The Iraqi school was transformed to the school of Hanafi and the school of Medina was transformed to the school of Malik. The reason of this transition from the geographical to the personal designation has been discussed by George Makdisi 1991, *Religion, Law and Learning in Classical Islam*, Galliard Ltd., Great Britain, p. 236-238.

However, it should be noted that what Crone and Newby have given examples are results of considerable research which claim that Islamic law, through its historical development, constitutes other traditions in the Near East; one of them is Jewish law. But at the same time they do not give us clear definition of what constitutes borrowing and external influences. Therefore, the similarities between certain institutions in Islamic law and other legal systems do not convincingly indicate that there is influence or borrowing.

In fact, in studying early Islamic law from a historical perspective, it would seem natural to consider the possibility that foreign elements may have influenced, or entered into this law. But Islamic law is a product of the intellectual activity of many generations of Muslim scholars in order for them to meet the changing social needs of their community. In this case, one should not ignore the historical process by which Muslim scholars modified, developed and changed Islamic law according to the needs of society. In contrast, using source-critical methods through historical study, including the relevant contemporary non-Arabic literatures, is very important to encounter a balance and to make sure that although the similarities between Islamic law and other legal systems cannot be denied, the historical process of the development of Islamic law is very different from that of other laws, and that it has its own special characteristics.

Conclusion

In conclusion, since Islamic law has been approached through a historical study by source-critical methods, it is assumed that Islamic law contains religious traditions of the Near East, one of them is Jewish law. The examples given by Crone and Newby support this claim. She argues that *qasâma* in Islamic law was derived from Jewish law and, she believes that this influence happened because the existence of the Prophet Muhammad did not abolish what Moses had done but only confirmed it. Newby also claimed that the account of 'Âmir b. Zârib in the *sîrah* of Ibn Ishâq concerning hermaphrodite was taken from the account of *Bekôrôth* 42b in Jewish law. This influence was pronounced in Iraq, where Islamic law gradually formulated, and where the Jewish academies of learning flourished.

Daftar Pustaka

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